Supreme Court, U. S.
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JAN 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-9901

RALPH JACOBSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: January 12, 1977

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No.

RALPH JACOBSON,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Ralph Jacobson, prays that a Writ of Certiorari issue to review the judgment entered on December 17, 1976 by the United States Court of Appeals for the Second Circuit in the proceeding entitled Ralph Jacobson, Petitioner-Appellant v. United States of America, Respondent-Appellee, Docket No. 76-1345.

Opinion Below

The opinion of the Second Circuit Court of Appeals, not yet reported, appears in the Appendix hereto. (Appendix, infra pp. A-1 thru A-7)

Jurisdiction

The judgment of the Court of Appeals was entered on December 17, 1976. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

Question Presented

Was prosecution of the Petitioner, for the instant offense, prohibited by the doctrine of collateral estoppel and are the standards by which the Second Circuit Court of Appeals applies this doctrine inconsistent with those established by the United States Supreme Court?

Constitutional Provisions

Amend. 5

CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

Title 26, United States Code, Section 7206(1):

§ 7206. *Fraud and false statements*

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

Title 18, United States Code, Section 894:

§ 894. *Collection of extensions of credit by extortionate means*

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub.L. 90—321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

Statement of the Case

On July 23, 1976, the Petitioner was convicted in the United States District Court for the Southern District of New York of one count of violating 26 U.S.C. § 7206(1) (Ap2).[1] As a result of this conviction, Mr. Jacobson was sentenced to a three year term of imprisonment (Ap 276). Petitioner appealed this conviction to the United States Second Circiut Court of Appeals (Ap 269). On December 17, 1976, an opinion of that Court issued affirming the conviction below (A-1 thru A-7). Accordingly, Petitioner now

[1] The letters Ap. are used to introduce references to Appellants Appendix on file in the United States Court of Appeals for the Second Circuit. The letter A refers to the annexed appendix.

seeks a Writ of Certiorari from this Court to review the decision of the Second Circuit Court of Appeals.

The mainstay of Petitioner's argument on appeal to the Circuit Court was that the underlying prosecution was prohibited by the doctrine of collateral estoppel (A-1 et seq.). In order to acquaint this Court with the factual basis of this Petition, it is necessary to briefly examine the facts which underlie not only the present case, but also those of the antecedent prosecution.

In 1973 Ralph Jacobson was indicted, in the Eastern District of New York, and charged with violations of 18 U.S.C. § 894.[2] Through this Indictment the Government alleged, *inter alia,* that the Petitioner had loaned a Theresa Lissauer money and that he had used extortionate means to collect the interest thereon. It was the Government's theory of the case that Jacobson would periodically meet with Miss Lissauer at Madame Lissauer's Dress Shop. They further claimed that during these meetings, Jacobson would either make loans or obtain re-payments and, at the very same time, engage in threatening conduct.

The Government relied on essentially one witness to establish these extortionate credit transactions. That was Theresa Lissauer. It is important to note parenthetically that prior to trial Miss Lissauer had indicated that numerous other individuals could corroborate her accounts of these meetings.

In defense of Indictment 73 CR 522, Mr. Jacobson asserted that *he* had never loaned Miss Lissauer anything.

[2] Indictment No. 73 CR 522, E.D.N.Y.

The defense case was presented through the various testimony of some thirteen witnesses. The majority of these witnesses were the self-same individuals Miss Lissauer had previously indicated would corroborate her story. Each categorically denied and rejected her accounts, and further, many cast grave doubt as to her reputation for veracity. It was further established that the single time that Jacobson was at Madame Lissauer's Dress Shop was to resolve a dispute that Miss Lissauer, his wife and niece had concerning clothing they had ordered from the shop.[3]

As an examination of the record of the trial of Indictment No. 73 CR 522 reveals, no evidentiary separation exists between the alleged incidents of interest re-payment and the alleged extortionate threats. That is to say, they are undeniably factually, temporally and spacially united. The defense of this Indictment was essentially to demonstrate to the jury that Miss Lissauer was a liar. There were no unusual circumstances present which would lend a rational jury to believe that loans had indeed been made and the interest thereon collected, but not that such interest was paid under duress of threat. One either believed her accounts of the loans and re-payments or one rejected her story and thereby the defendant's alleged participation.[4]

Subsequent to the Petitioner's acquittal on the aforementioned Indictment, he was again indicted, this time in the Southern District of New York, for violations of 26 U.S.C. §7206(1). The gravamen of this Indictment was that the defendant had made a wilful misstatement on his

[3] Petitioner Jacobson has conceded his presence on this one occasion throughout all proceedings.

[4] Petitioner does not necessarily challenge the fact that Lissauer may have obtained loans from someone, he categorically rejects however, that he was that someone.

income tax return by failing to reveal the receipt of interest income from loans made to Theresa Lissauer.

Prior to trial, Petitioner moved before the District Court (S.D.N.Y.) to dismiss the Indictment on the grounds that re-prosecution was foreclosed by the doctrine of collateral estoppel. However, the Trial Court, applying the standards established by the Second Circuit Court of Appeals, found that "... while the defendant's interpretation of the 1973 [sic] verdict is *certainly plausible,* nevertheless it does not follow, as argued by the defendant, that the jury verdict in the prior trial *necessarily* resolved in his favor the issue of the loan transaction which the present Indictment raises ..." *United States* v. *Jacobson,* 404 F. Supp. 1238, 1240 (S.D.N.Y. 1975) (emphasis supplied).

At the trial of the second Indictment, the Government once again proffered the testimony of Theresa Lissauer to establish that these alleged loan transactions had taken place. As the Circuit Court observed:

> "... the government's case in the second trial rested on the testimony of a witness whose credibility was necessarily in issue in the first trial when she gave the same story ..." (A-2)
>
> • • •
>
> "The government's case against Jacobson for the year 1968 rested primarily on the testimony of one witness, Theresa Lissauer." (A-3)
>
> • • •
>
> "The entire theory of the defense was that there had never been a loan transaction." (A-3)
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> • • •
>
> "Similar testimony had been adduced from Theresa Lissauer and other witnesses in a previous

trial before Judge Dooling in the Eastern District in November, 1974. The jury in that trial acquitted Jacobson of the charges of having used extortionate means to collect loan payments from Theresa Lissauer and several others." *United States* v. *Jacobson,* Slip Op. No. 376 pp. 1021-1027 (2nd Cir., December 17th, 1976). (A-3,4)

Although the above quoted observations of the Circuit Court appear to reinforce Petitioner's claim, that the second trial involved the re-litigation of the identical factual issues on the basis of a virtually identical evidentiary presentation, his conviction was nonetheless affirmed.

Reasons for Granting the Writ

As Rule 19(1)(b) of the Supreme Court Rules indicates, an important consideration in granting or denying a Writ of Certiorari is whether a Court of Appeals "... has decided a federal question in a way in conflict with applicable decisions of this Court. . ." It is Petitioner's claim that the rules and standards, which have been established by the United States Court of Appeals for the Second Circuit, in applying the doctrine of collateral estoppel, so depart from the decisions of the United States Supreme Court[5] on this issue, that there exists compelling reason to grant review of this case.

Simply stated, it is Petitioner's claim at bar that the Second Circuit Court of Appeals, through a series of decisions, has developed a set of standards which are not only technical and over-restrictive but which, in effect "... sim-

[5] *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189 (1970); *Sealfon* v. *United States,* 332 U.S. 575, 68 S.Ct. 237 (1948); *Harris* v. *Washington,* 404 U.S. 55, 92 St.Ct. 183 (1971); *Turner* v. *Arkansas,* 407 U.S. 366, 92 S.Ct. 2096 (1972).

ply amount to rejection of the rule of collateral estoppel in criminal proceedings . . ."[6] This Court's attention is respectfully drawn to the following cases from which, it is asserted, these overly-strict standards have evolved.

One of the earliest cases in this series is *United States* v. *Cioffi,* 487 F.2d 492 (2nd Cir. 1973). The language reflected in the decision in *Cioffi* reveals the restrictive and inelastic attitude of the Court.

> ". . . [it is] the rare case where [it is] possible to determine with certainty what the jury in the earlier prosecution had decided." 487 F.2d at 498.
>
> • • •
>
> "Compare Justice Schaefer's perceptive remarks: 'The defense of collateral estoppel will not often be available to a criminal defendant. . . . collateral estoppel is therefore of limited value because it is not often possible to determine with precision how the judge or jury has decided any particular issue." 487 F.2d at 498 n.8

In 1974, the Second Circuit decided the case of *United States* v. *Tramunti,* 500 F.2d 1334 (2nd Cir. 1974). In *Tramunti,* the Court emphasized its view that the burden to establish the viability of the claim of collateral estoppel rested firmly with the defendant.

> "In order to establish that the present prosecution is barred by the previous acquittal in Imperial, the burden is on the appellant to show that the verdict there *necessarily* decided the issues now in litigation. *United States* v. *Friedland,* 391 F.2d 378, 382 (2nd Cir. 1968). Since it is usually impossible to de-

[6] *Ashe* v. *Swenson,* 397 U.S. 436, at 444, 90 S.Ct. 1189 (1970).

termine with any precision upon what basis the jury reached a verdict in a criminal case, it is a rare situation in which the collateral estoppel defense will be available to a defendant. *United States* v. *Cioffi,* 487 F.2d 492, 498 (2nd Cir. 1973)" 500 F.2d at 1346.

Later in 1974, the Second Circuit once again discussed the doctrine of collateral estoppel. In *United States* v. *Gugliaro,* 501 F.2d 68 (2nd Cir. 1974), the Court emphasized that the burden which a defendant must meet to invoke the doctrine of collateral estoppel was so difficult that it would be the truly extraordinary situation when such a claim might succeed.

> "Moreover, as we had noted in *United States* v. *Tramunti, supra,* this presents the defendant who has been acquitted in a criminal case with a *most difficult burden* since it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict." 501 F.2d at 70. (emphasis supplied)

In 1975, the Second Circuit Court of Appeals heard the case of *United States* v. *Cala,* 521 F.2d 605 (2nd Cir. 1975). Although the Court had previously indicated in *United States* v. *Gugliaro* that a defendant raising collateral estoppel faced a difficult burden, Judge Mansfield in this decision seemed to state the standards in even more unequivocal terms.

> "Having in mind that it is a *rare case* where a defendant can sustain his burden of establishing that the prior jury necessarily decided an essential issue in his favor, see *United States* v. *Gugliaro, supra,* 501 F.2d at 70, we are satisfied that the burden was not met here." 521 F.2d at 609. (emphasis supplied)

The final case of this series, *United States* v. *Seijo,* 537 F.2d 694 (2nd Cir. 1976), demonstrates the solidification and implementation of these "Second Circuit standards." By *Seijo,* the Circuit Court had arrived at the position of virtually requiring a defendant to show with a *mathematical certainty* that the issue which he claimed is now foreclosed from re-litigation was resolved by the antecedent criminal jury.

Petitioner respectfully asserts that the Circuit Court's standards so depart from the standards established by the United States Supreme Court for the application of the doctrine of collateral estoppel that appellants raising such claims before this circuit are deprived of due process of law. This proposition is reinforced when one compares the language used by this Court—concerning the application of this doctrine—with the language of the Circuit Court noted above. In the 1970 decision of *Ashe* v. *Swenson, supra,* the Court not only recognized the Constitutional foundation of the doctrine of collateral estoppel,[7] but it also established the standard by which the doctrine should be imposed.

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of the prior proceedings, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a ra-

[7] "The ultimate question to be determined, then, in the light of *Benton* v. *Maryland, supra,* is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is." 397 U.S. 445.

> tional jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all of the circumstances of the proceedings.' *Sealfon* v. *United States,* 332 U.S. 575, 579 68 S.Ct. 237, 240. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." 397 U.S. 444.

Conspicuously absent from the above quoted passage is any statement that a defendant raising a claim of collateral estoppel must necessarily demonstrate that the previous criminal jury certainly could not have reached its verdict on a separate issue.

In this vein, it must be remembered that the District Court concluded that the defendant's explanation of the first jury's verdict was "certainly plausible." However, under the standards which have been engrafted upon the doctrine of collateral estoppel by the Second Circuit, that Court felt compelled to nonetheless reject Petitioner's argument. It ruled that since the defendant must "necessarily" demonstrate with ". . . certainty upon what basis the previous jury reached its general verdict . . ." the defendant's argument must fail (404 F.Supp. at 1240).

In addition, Petitioner notes that the decision in *Ashe* was, to some degree, compelled by the very conduct which is sought to be prohibited at bar—that is, prosecutions *seriatim* of a single criminal transaction by indictments charging offenses containing dissimilar elements.

> ". . . in more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. (Citation omitted) As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced. (Citations omitted) The federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law." 397 U.S. at 446 note 10.

After the Government had its second bite at the apple—this time resulting in the conviction of the Petitioner—the Circuit Court, applying its own strict standards, similarly rejected the Petitioner's claim of collateral estoppel. In reliance on its previous decisions in *Cioffi, Cala* and *Seijo,* the Court applied what Petitioner asserts was a standard of virtual "mathematical certainty" in analyzing the factual claims presented. Nowhere in *Ashe* or *Sealfon* does this Court direct that there shall be imposed a "heavy and most difficult burden" (*United States* v. *Gugliaro*) upon a defendant asserting the doctrine of collateral estoppel. Nor has this Court directed that a defendant must affirmatively show that the previous verdict certainly decided the issue now in litigation. (*United States* v. *Gugliaro*) Nor does the statement that:

> " . . . it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case [therefore] it is a rare situation in which the collateral estoppel defense will be available to a defendant . . ." (*United States* v. *Tramunti,* 500 F.2d 1346)

comport with the language in *Ashe,* to wit:

> "The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book . . . the inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances and proceedings' . . . any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings."

If a defendant is going to be put to the test of establishing with "certainty" that a criminal jury could not have conceivably decided a particular case on one element as opposed to another, the doctrine of collateral estoppel, for all intents and purposes, may be discarded.

In offenses of multiple elements, the general verdict of the criminal jury will always leave room for speculation as to why the defendant was acquitted. An examination of the facts of the instant case reveal it would be virtually inconceivable to conclude that the jury who sat for Petitioner's extortion trial believed that it was the Petitioner who was lending and collecting money but not the Petitioner who threatened her. As indicated, there was no factual, temporal or spacial separation between the proof which was offered to establish the loans and that which was offered to establish the extortionate means. No separate Government witness had appeared to corroborate the extortion and not the loans. No argument may be made that the credibility of one set of witnesses outweighed that of another. Finally, the circumstantial proof which the Government claimed corroborated Miss Lissauer's testimony either corroborated the entire story or failed to corroborate it at all.

It is no doubt conceivable that the jury in *Ashe* could have concluded that no robbery had taken place, or that *Ashe* was unarmed, or that the first victim was not one of the cardplayers present. Such conclusions are certainly not mathematically impossible but they are neither plausible nor realistic. It is similarly implausible and unrealistic to conclude that the jury of Indictment No. 73 CR 522 never reached the issue of whether it was the Petitioner who lent money to Theresa Lissauer.

Unless this Court concludes that the instant Writ of Certiorari should be granted, the Circuit Court of Appeals will continue to impose the stringent standards outlined herein. It is respectfully suggested that these standards are inconsistent with the rules previously established by the United States Supreme Court. Therefore, this Court is respectfully urged to grant review of the instant judgment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: January 12, 1977

Respectfully submitted,

s/ James M. La Rossa
Attorney for Petitioner

James M. La Rossa
John W. Mitchell
Of Counsel

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 376—September Term, 1976.

(Argued October 29, 1976 Decided December 17, 1976.)

Docket No. 76-1345

UNITED STATES OF AMERICA,

Appellee,

—v—

RALPH JACOBSON,

Defendant-Appellant.

Before:

LUMBARD and VAN GRAAFEILAND, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from a judgment of conviction for material misreporting of income in violation of 26 U.S.C. § 7206(1) entered by Judge Morris E. Lasker in the United States District Court for the Southern District of New York after a jury verdict.

Affirmed.

STEVEN K. FRANKEL, Special Attorney, United States Department of Justice (Robert B. Fiske, Jr., United States Attorney for the

* Sitting by designation.

Southern District of New York; Jacob Laufer, Special Attorney, United States Department of Justice; and Frederick T. Davis, Assistant United States Attorney, Southern District of New York, on the brief), *for Appellee.*

JAMES LAROSSA, Esq., New York, N.Y. (LaRossa, Shargel & Fischetti and Gerald L. Shargel, Esq., New York, N.Y., on the brief), *for Appellant.*

LUMBARD, *Circuit Judge:*

Ralph Jacobson appeals from a conviction entered by Judge Morris E. Lasker on July 23, 1976 after a jury trial in the Southern District of New York. Under 26 U.S.C. § 7206(1) Jacobson was convicted of filing a false and fraudulent 1968 federal income tax return in failing to report interest income derived from money lending and was acquitted on a second, unrelated count that involved an alleged failure to report certain capital gains on his 1969 return.

On appeal Jacobson contends that the prosecution for failure to report interest income should have been foreclosed because two years earlier he had been acquitted in the Eastern District of having used extortionate means to collect that same interest income, 18 U.S.C. § 894. Since the government's case in the second trial rested on the testimony of a witness whose credibility was necessarily in issue in the first trial when she gave the same story, Jacobson attempts to invoke the principles of double jeopardy and collateral estoppel or, failing this, urges us to exercise our supervisory powers to forbid unfair prosecutorial proceedings. In the alternative, he asks that

his conviction be reversed because of an allegedly erroneous jury charge. We affirm.

The government's case against Jacobson for the year 1968 rested primarily on the testimony of one witness, Theresa Lissauer. Mrs. Lissauer testified that she had borrowed over $3000 from Jacobson in 1968 for her financially distressed dress shop in Queens, and that she made payments on this debt in amounts of at least $150 to $200 per week throughout 1968 and up until March 1969. From such payments Jacobson's interest income in 1968 must have totalled over $5000. On his income tax return for 1968, however, he reported only $3440 as "miscellaneous income" and listed nothing at all in the box for "interest income." Thus, if fully credited, Lissauer's testimony was clearly sufficient to support a conviction for material misreporting of income. For indirect corroboration of the Lissauer loans the government introduced testimony from several other witnesses that Jacobson had also lent money to them.

The entire theory of the defense was that there had never been a loan transaction. Although Jacobson did not testify himself, several witnesses were called to rebut Lissauer's claims that Jacobson had made frequent visits to her shop to collect payments. Also, Jacobson's niece testified that she and Mrs. Jacobson had ordered dresses from Lissauer only to receive damaged goods; defense counsel argued that the one time Jacobson demanded money from Lissauer was when he was asking for his money back on these defective dresses. After a few hours deliberation the jury convicted Jacobson on the interest income count —and acquitted him on the unrelated count for 1969.

Similar testimony had been adduced from Lissauer and the other witnesses at a previous trial before Judge Dooling in the Eastern District in November 1974. The jury in

that trial acquitted Jacobson of charges of having used extortionate means to collect loan payments from Lissauer and several others. When he was later indicted in the instant case, Jacobson moved to dismiss on double jeopardy grounds, but Judge Lasker denied the motion. 404 F.Supp. 1238 (S.D.N.Y. 1975).

We agree with the district court's conclusion that the prior acquittal on extortion charges does not bar the present prosecution for tax crime. As Judge Lasker noted in his opinion before trial, the doctrine of collateral estoppel acts through the double jeopardy clause to preclude the government from relitigating an issue of fact once the issue has been resolved in the defendant's favor in prior proceedings between the same parties. See, e.g., *Ashe* v. *Swenson,* 397 U.S. 436 (1970); *United States* v. *Cala,* 521 F.2d 605, 607-08 (2d Cir. 1975). However, estoppel applies only to questions that were necessarily resolved by the first jury in reaching its verdict. See, e.g., *United States* v. *Seijo,* 537 F.2d 694, 698 (2d Cir. 1976). The defendant must demonstrate that the prior jury could not reasonably have grounded its verdict upon an issue other than that which he now seeks to foreclose from consideration. Although the court should not strain to dream up hypertechnical and unrealistic grounds on which the previous verdict might conceivably have rested, *Ashe* v. *Swenson,* supra, 397 U.S. at 444, here there is clearly a substantial possibility that the first jury did not actually decide the issue on which estoppel is being sought. Two separate factual elements were necessary to the government's case at the first trial; the jury had to decide whether the loan transactions had taken place and, if so, whether the defendant had used extortionate means to collect on the loans. Based on the evidence and on the closing argument of defense counsel at the first trial, the jury could have acquitted Jacobson solely because the government had failed to prove extor-

tion and not because of any failure of proof on the existence of the loans. Thus, the verdict at the first trial did not establish the nonexistence of the loans for purposes of collateral estoppel at subsequent trials.

Even where collateral estoppel does not apply, however, it has been suggested that particularly unfair bifurcations of prosecutions should be prohibited under the double jeopardy clause or under the supervisory power of the federal courts. See *United States* v. *Mallah,* 503 F.2d 971, 985 n.7 (2d Cir. 1974); *United States* v. *Cioffi,* 487 F.2d 493, 496 & n.4 (2d Cir. 1973). For example, it would be highly questionable to prosecute a conspiracy charge in addition to, and separately from, any substantive offense committed as part of the conspiracy. See *Markes* v. *United States,* 370 U.S. 723 (1962); *Petite* v. *United States,* 361 U.S. 529 (1960). Here, however, the crimes charged in the separate indictments involved some substantially different elements. Cf. *United States* v. *Alessi,* 536 F.2d 978, 981 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3364 (Nov. 15, 1976). The failure to report interest income and the extortion of interest payments are independent acts and they involve different motives and different problems of proof. We therefore find nothing patently unreasonable or unjust in the government's practice of prosecuting tax crimes separately from related income-generating crimes. Jacobson's later tax trial was not improper.

Jacobson's second contention is that the jury was incorrectly charged. Judge Lasker instructed the jury that

> nobody can be convicted merely for putting an item of income in the wrong box, unless you find that by putting it in the wrong box that person intended to defraud the government.

Defense counsel objected to inclusion of the final "intent to defraud" phrase. He argued that 26 U.S.C. § 7206(1)

sanctions only the nonreporting of income and thus never applies to a mere misplacement of income.

We believe the district court's charge was a correct statement of the law. By its terms § 7206(1) prohibits any willful misreporting of a material fact, not just nonreporting of income. Therefore, where mislabelling of income in order to conceal its source is used for the purpose of frustrating tax enforcement by the government, § 7206(1) is violated. See, e.g., *United States* v. *DiVarco,* 484 F.2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

Nonetheless, Jacobson points out that the charge may have been too broadly interpreted by the jury under the circumstances peculiar to this case. The words "intended to defraud the government" might be thought to cover the case of a loanshark who reported his interest income in the wrong place on his tax return in order to conceal his involvement in extortionate or usurious credit activities. The jury may have believed Lissauer's testimony as to the existence of the loans but not as to the frequency and size of her payments on the loans; accordingly, they might have concluded that the total amount of interest was under $3440 and was included in Jacobson's 1968 return under miscellaneous income. Thus, it is possible that the jury believed Jacobson had reported all his income and had not sought to evade taxes, but still convicted him for attempting to deceive the government with respect to his loansharking business. It could be argued that convicting a defendant on such grounds violates the fifth amendment privilege against self-incrimination, see generally *Marchetti* v. *United States,* 390 U.S. 39 (1968); *United States* v. *Sullivan,* 274 U.S. 259 (1927), or that in any event such a conviction is improper under § 7206(1) where the misreporting was immaterial to the collection of taxes. Cf. *United States* v. *Garcilaso de la Vega,* 489 F.2d 761, 765 (2d Cir. 1974). Accordingly, Jacobson asserts that the jury

should have been clearly cautioned against arriving at a conviction in this manner.

We need not consider Jacobson's argument, however, because it was never presented to the district court. In its evidence and in its argument to the jury, the defense based its case wholly on the claim that there had been no interest income whatsoever in 1968. The charge on misplacement of income was initially given by Judge Lasker only in connection with the unrelated, capital gains count. At that time defense counsel objected unsuccessfully on the ground that misplacement can never be a valid ground for a conviction under § 7206(1); as we have indicated above, this objection was frivolous. Later, the jury requested further instruction with respect to the interest income count, after conceiving on its own initiative of the possibility that the Lissauer interest income might have been included under "miscellaneous income" on Jacobson's 1968 return. It was in response to this request that Judge Lasker gave the instruction complained of, but there is no indication in the record that defense counsel made any objection at this later juncture. It is only in the context of the interest income count, however, that the charge suffers from any possible infirmity, and thus Judge Lasker was never alerted to the ambiguity which Jacobson has now brought to our attention. Since the misplacement of income theory was not even argued to the jury by defense counsel on the count now in question, the defendant is precluded from raising a novel complaint about the jury instructions for the first time on appeal. There has been no plain error affecting substantial rights such as would warrant our consideration under Fed. R. Crim. P. 52(b).

Conviction affirmed.

Appendix B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

76-1345

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of December, one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD
HON. ELLSWORTH A. VANGRAAFEILAND
Circuit Judges
HON. DUDLEY B. BONSAL
District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RALPH JACOBSON,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

by Vincent A. Carlin
Vincent A. Carlin
Chief Deputy Clerk